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NO.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

CECILIA ELSTON, ET AL.
Petitioners

versus

BOARD OF LEVEE COMMISSIONERS
OF THE ORLEANS LEVEE DISTRICT
OF THE STATE OF LOUISIANA, ET AL.,
Respondents

# PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEAL STATE OF LOUISIANA

VOLUME I

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## QUESTIONS PRESENTED

**WHETHER** a State may constitutionally wrest title to real property from private citizens on the sole basis of a period of bad faith adverse possession, in the absence of compensation or due process of law, and within a legal system which prohibits private citizens from taking title from the State on the same possessory grounds.

**WHETHER** the domestic law of a State may operate so as to divest and adversely dispose of a title to real property which stands in the name of the United States and, with reference to which, the United States is the owner of registry and record.

**WHETHER** controlling Federal law may be ignored, in the face of Art. VI of the United States Constitution, in disposing of title rights guaranteed by treaties of the United States and required to be respected by both the Constitution and laws of the United States.

**WHETHER** the title at bar arises under a treaty or the Acts of Congress in relation to public lands or by reason of the acts of officers of the Land Department of the United States.

## PARTIES AT BAR

### Parties Plaintiff

1. The heirs of Hubert Burat (Buras), certified as a class. Class representatives are Cecilia Elston, Rita Merritt, Edgar Ansardi, and Ernest Buras, Jr.

### Parties Defendant

1. The Board of Levee Commissioners of the Orleans Levee District of the State of Louisiana
2. Chevron U.S.A., Incorporated
3. Chevron Pipeline Company
4. Gulf Refining Company
5. Louisiana Power and Light, Incorporated
6. Shell Oil Company
7. Estate of William G. Helis, and Helis Enterprises, Incorporated

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

SUCCESSION OF HUBERT BURAT (BURAS),
Plaintiffs-Petitioners

versus

THE BOARD OF LEVEE COMMISSIONERS
OF THE ORLEANS LEVEE DISTRICT
OF THE STATE OF LOUISIANA, ET AL.,
Defendants-Respondents

# APPEAL AND PETITION FOR WRIT OF CERTIORARI

The heirs of Hubert Burat, certified as a class, appeal and petition for writs of certiorari and review directed to the Supreme Court of the State of Louisiana from a decision entered in this case on October 4, 1985 by that Court.

## OPINIONS BELOW

1. A ruling of the 25th Judicial District Court, Parish of Plaquemines, State of Louisiana dated June 16, 1983, Case No. 14-706.

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2. A ruling of the Fourth Circuit Court of Appeals of the State of Louisiana styled and cited as Succession of Burat (Buras) v. The Board of Levee Commissioners, et al., 469 So.2d 1022 (La.App. 4th Cir., 1985), reh'g. denied, May 29, 1985.

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3. A ruling of the Supreme Court of the State of Louisiana declining to review the decision cited in paragraph two styled and cited as Succession of Hubert Burat (Buras) v. Board of Levee Commissioners, et al., 475 So.2d 1095 (La. 1985), Docket No. 85-C-1311.

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## STATEMENT OF JURISDICTION

This appeal and application for certiorari is made pursuant to 28 U.S. Code, Sections 1257(1) (2) and (3). Review is prayed for from a decision of the Supreme Court of the State of Louisiana dated and entered on October 4, 1985 and styled and reported as Succession of Hubert Burat (Buras) v. Board of Levee Commissioners of Orleans Levee District, et al., 475 So.2d 1095 (La. 1985), Docket No. 80-C-1311.

**SPECIAL REFERENCE** is made to Rule 17.1.(b) of the Rules of this Court inasmuch as the ruling of the Supreme Court of Louisiana stands in conflict with the decisions of other courts of last resort in other states of the United States.

**SPECIAL REFERENCE** is also made to the denial of due process and equal protection inherent in the taking of land at bar.

**SPECIAL REFERENCE** is further made to the infringement of the plenary power of the United States over lands within its public domain.

**FINAL AND SPECIAL REFERENCE** is made to the principle that the Supreme Court of the United States has and should exercise jurisdiction by appeal to review the supreme court of a state in cases in which the matter arises under a treaty or the acts of Congress in relation to the public lands or where the case turns upon the actions of land officers of the United States.

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V;

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1;

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Article IV, Section 3, Clause 2;

Section 3, Clause 2. Public Lands.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

United States Constitution Article VI, Clause 2;

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

**TREATIES INVOLVED**

The Louisiana Purchase and ancillary treaties of 1803;

TREATY, Between the United States of America and the French Republic, April 30, 1803, Art. II and III (8 Stat. 200).

* * *

Art. II. In the cession made by the preceding article are included the adjacent islands belonging to Louisiana, all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private property.--The archives, papers, and documents, relative to the domain and sovereignty of Louisiana, and its dependences, will be left in the possession of the commissaries of the United States, and copies will be afterwards given in due form to the magistrates and municipal officers, of such of the said papers and documents as may be necessary to them.

Art. III. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.

## FEDERAL STATUTORY PROVISIONS INVOLVED

Act of Congress, March 26, 1804 (2 Stat. 283); Appendix page 37

Act of Congress No. 701, March 2, 1805 (2 Stat. 324); Appendix page 39

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Act of Congress, June 2, 1858 (11 Stat. 249); Appendix page 52

Act of Congress, February 28, 1859 (11 Stat. 387) Appendix page 53

## LOUISIANA STATUTORY PROVISIONS INVOLVED

La.Rev.Stat. 38:295.

Sec. 295. Acquisitive Prescription Shall Not Run Against Levee Districts.

The prescription by which the ownership of property is acquired as defined by Article 3458 of the Louisiana Civil Code shall not run against any Levee District of the State or against the Board of Commissioners of any Levee District.

## STATEMENT OF THE CASE

The plaintiffs, Cecilia Elston, Rita Merritt, Edgar Ansandi, and Ernest Buras, Jr., represent a certified class comprised of the heirs of Hubert Burat or Buras, a first generation Louisiana pioneer. His parents had come to Louisiana from Nova Scotia in one of the earliest migrations and were already there when Hubert was born in 1772.

In 1795, Burat became an actual settler on the lands at bar, lands which lie along the East Bank of the Mississippi River and which were then known as the "Batture du Diable." The land was a poorly defined swamp invested periodically by floods, hurricanes, mosquitoes and disease. New Orleans, in those days, was a six-day round trip by horse and civilization's only real outpost was a priest who ventured "down below" perhaps once a year to solemnize marriages, christen babies, and resolve quarrels.

Burat remained on this land until his death in 1847, a fact which is noted in the United States Census figures for 1810, 1820, 1830, and 1840. The possession of his heirs is also confirmed by census information stretching from 1850 through 1880.

He was on this land in 1803 when the United States purchased all of Louisiana. The purchase was by treaty, Articles II and III of which required and guaranteed that landhold rights in existence at the time of the purchase be honored and enforced. (La. Purchase Treaty; April 30, 1803; 8 Stat. 200).

Pursuant to these provisions, the United States agreed to recognize prior grants of land by the former sovereign. If those grants were complete and valid under the laws of that sovereign, the land did not enter into the public domain of the United States by virtue of the purchase. This was

true in every instance in which the United States extended its borders; it did not acquire title to land already given away or sold by the prior sovereign. However, the claim of Hubert Burat was not such a claim. Burat had acquired no ownership interest in the lands at issue as of the date of the Louisiana purchase, and thus the property fell into the public domain of the United States, to be divested solely by its own laws and acts and solely in the time, manner, and conditions of its choosing.

Congress, pursuant to the obligations of the purchase treaty, did, in fact, enact a series of statutes setting out procedures and conditions through which one could obtain a title from the United States. These conditions included possession, filing a claim, confirmation, survey of the land, and certain other pre-requisites.

Burat made first formal notice of his claim in 1820, but it was 1837 before supplemental

filings led to the acceptance of the claim by the land office and its presentation to the Congress. By then, although his claim was later confirmed by Congress, it was too late for Burat because the land had already been sold to pre-empters.

What had happened was that a survey commissioned by the United States in 1832 erroneously put the Burat estate in the wrong sections of land and correspondingly showed the actual Burat claim as vacant. Four sets of purchasers took advantage of the error and, pursuant to pre-emption statutes, they secured purchase certificates to the estate which comprises Sections 29, 30, 31 and 32 of Township 19 South, Range 16 East of the Mississippi River District. These sales took place in 1836, prior to the acceptance and submission of the Burat claim. Later in 1836 and in 1837, these certificates were sold to Andrew Hodge, a bona fide purchaser in good

faith. Hodge secured patents on the land in 1838 and 1839, divesting the United States of title long before the Congress considered the Burat claim.

Burat's claim, bearing number sixty, was not, in fact, confirmed by Congress until 1842 and then only by an act which specifically provided in Section 4 that "this Act shall amount only to a relinquishment on the part of the United States, and shall in no manner affect the rights of third persons (read Hodge)." [(5 Stat. 491); App. 51] Section 4 of the Act further provided that a patent would issue only after the "presentation to the Commissioner of the General Land Office of a plat of survey duly approved by the surveyor-general. . ." [App. 51.] No survey was approved until 1885, long after Burat's death. Note that not even so much as an equitable title could have therefore been given Burat by this confirmatory act. At best, he acquired an equitable right. For the distinction

between equitable title and equitable rights, see Johnson v. Wood, 138 Tex. 106; 157 S.W.2d 146 (1941).

Had this been the end of the matter, it would have been the end of the Burat claim. However, it was not. In 1861, the United States purchased Sections 29 and 32 back from the heirs of Andrew Hodge. The sale was accepted and a deed in favor of the United States was appropriately recorded in the conveyance office of Plaquemines (pronounced PLAK'-UH-MINS) Parish, Louisiana. This made the United States the owner of record of Sections 29 and 32. In that status, the United States remained until 1972 when the patent office finally issued a patent to the Burat heirs.

Following the issuance of those patents, the instant suit was filed. The Board of Levee Commissioners of the Orleans Levee District of the State of Louisiana ("Levee Board") and its various

lessees were named defendants because in 1925 the Levee Board had purported to acquire the lands patented to the Burat heirs. These acquisitions occurred pursuant to a legislative authorization granting to the Levee Board the jurisdiction to construct the proposed Bohemia Spillway. These acquisitions also occurred despite the fact that the Burat claim to the sections of land was filed of record in Plaquemines Parish, as was a 1861 reconveyance from Hodge to the United States.

The respondents-defendants excepted to the plaintiffs' demand with pleas of ten and thirty year acquisitive prescription (acquisition by bad faith possession), and with a plea of peremption based upon tax sales. Trial was had, and the defendants introduced evidence of their possession by way of affidavits. Live testimony was also elicited from some of the descendants of the pre-acquisition residents of the area.

The Honorable Julian Bailes, Judge Pro Tempore of the 25th Judicial District Court for the Parish of Plaquemines, Louisiana, rendered judgment for the defendants, sustaining their plea of thirty year acquisitive prescription, and dismissed the plaintiff's suit. In response to the argument that title to these lands was in the United States until 1972, and that prescription could not run against the United States, the trial court reasoned that the Burat claim had been satisfied as early as 1842, despite the fact that the United States Surveyor General for the District of Louisiana, as late as 1888, had termed the Burat claim "unsatisfied" and despite the fact that Burat's son was refused a patent. The trial court also found that there was no constitutional or statutory proscription against a public body acquiring property by prescription despite bad faith or lack of just title. Finally, the trial court adopted conclusory statements contained

in the defendants' trial memorandum to hold that sufficient evidence of thirty year possession had been introduced. (App. 24). The Burats appealed that judgment and the defendants answered that appeal. From a court of appeal affirmance of the lower court (App. 1), the Burats requested a rehearing which was denied on May 29, 1985 (App. 35). The Supreme Court of Louisiana denied writs on October 4, 1985, thus closing the matter in the courts of that State. (App. 36). From these adverse decisions, the Applicants respectfully petition this Court for relief.

The courts of Louisiana have thus wrongly and unjustly wrested this title from the class of the heirs of Burat in favor of a public body, the Levee Board, said to have acquired title by "squatter's rights," or by a bad faith possession.

The 30-year period required for such a title by domestic law extends through the periods

both prior to and after 1972 and thus includes periods in which both the United States and the Burats were owners of record. Further, the domestic law of Louisiana, in a blatant violation of equal protection, denies title by such possession in favor of private citizens as against the state.

The Burats received nothing by way of compensation.

The case, therefore, presents compelling and important constitutional dimensions. A state must not be permitted, by bad faith--i.e., no just title--to take, offering neither compensation nor due process in return. A state must not be permitted to take from private citizens when taking by those same the citizens is prohibited. A state must not be permitted to wrest title from the United States where the United States stands as the owner of record. Finally, a state must not be permitted to ignore the clear imperatives of the

laws of the United States in wresting land unto itself.

These questions were first raised in the courts of the United States. There, original jurisdiction was denied by the United States Court of Appeals for the Fifth Circuit on grounds that such jurisdiction was premature. The specific holding of the Fifth Circuit was that wrongful taking by bad faith possession and failure to honor the laws of the United States (in response to the Burat claim on the 1972 patent) were "anticipated defenses" and that "It is well settled that matters of defense anticipatorily urged do not create federal questions of jurisdiction." Heirs of Burat (Buras), et al. v. Board of Levee Commissioners of Orleans Levee District of the State of Louisiana, et al., 496 F.2d 1336 (5th Cir. 1974); reh'g den., cert. den., 42 L.Ed.2d 644, 419 U.S. 1049, 95 S.Ct. 625 (1974).

**These anticipated defenses have now become a reality.** They have been urged and wrongly accepted in the state district court, in the Louisiana state Court of Appeals for the Fourth Circuit and in the Louisiana Supreme Court.

This case has always, and does now, turn on the Constitution and laws of the United States. The entire body of constitutional and federal law relevant to the questions at bar has been both set aside and torn in its fabric by the decisions below. This is a wrong which only this high court can set right.

## ARGUMENT:

## REASONS WHY WRITS SHOULD BE GRANTED

**1. WRITS SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE STATES AS TO WHETHER A STATE, ACTING AS A BAD FAITH SQUATTER, MAY TAKE LANDS FROM PRIVATE CITIZENS WITH NEITHER COMPENSATION NOR DUE PROCESS, SOLELY ON THE BASIS OF A PERIOD OF ADVERSE POSSESSION. THIS COURT SHOULD PROHIBIT SUCH PATENT VIOLATIONS OF PROPERTY RIGHTS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS.**

### THE BAD FAITH TAKING

The language of the law of Louisiana is rooted in the French Civil Code and is both colorful and unique. There, the concept of acquiring title to

land by a period of possession is called "acquisitive prescription" and a title so obtained is said "to prescribe."

Ten year acquisitive prescription is based upon good faith acquisitive possession with just title for a period of ten years. Thirty year acquisitive faith prescription is based upon bad faith possession, or possession without just title, for a period of thirty years.

Taking by bad faith possession is a unique concept. It is one of a very few precepts at law by which something of value can be taken by a person acting in bad faith, at the expense of another, without reference to considerations of fairness, equity, or compensation.

In the case of private persons, the law permits this kind of bad faith gain only to secure certain ends rooted in what is seen to be sound policy. As Oliver Wendell Holmes noted in his

treatise on The Common Law (1881), these interests lie in the securing of the productivity of the land and (on a note of hard Yankee realism) preserving peace in society.

These policies are entirely inapplicable to public bodies. The state generally keeps land out of commerce and rarely engages in feuds. Moreover, public bodies are chartered to serve. Indeed, trust and service are their essence. Enrichment of a public body at the expense of its citizens runs counter to this purpose--what it should protect, it destroys--what it should maintain, it takes. This is a basic wrong because a state, in fair constitutional terms, must possess for the people--never adversely.

This conclusion is expressed in the Fifth and Fourteenth Amendments. Bad faith prescriptive title by a state (acting as a squatter) strips the landowner of basic rights to compensation and to

due process which are patent on the face of these Amendments. It also strips such a landowner of his right to contest the public necessity and purpose of the possession. Nonetheless, it has been approved by the courts of Louisiana.

## THE CONFLICT

The Supreme Court of Alaska has rejected this nonsense and ruled that a public body may not take land in this fashion. The relevant decision is Ault v. State, 688 P.2d 951 (Alaska, 1984). There, as here, the state claimed title by bad faith possession. Citing not only the Constitution of Alaska, but also the Fifth Amendment to the United States Constitution, the Supreme Court of Alaska held as follows:

> There is an obvious tension between the state's ability to acquire land by adverse possession and the constitutional prohibition against the state's

> taking private property without just compensation. Because of the prohibition, it is, in our view, appropriate to narrowly construe the circumstances under which the state may acquire property by adverse possession. In particular, as to state adverse possession claims under color of title, we believe that good faith should be defined as an honest and reasonable belief in the validity of the title. Whether these requirements are factually present in this case must be the subject of further proceedings in the superior court. (footnote omitted); Ault, supra at 956.

This not only recognizes the correct constitutional rule, but also brings this case directly within the purview of Rule 17.1.(b) of the Rules of this Court. The Rule provides that the Court will consider it a special and important reason for writs:

> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

Note also that the Alaska decision is not isolated. Inasmuch as the Levee Board has powers of expropriation, the plaintiffs interpret Sayre Land

Company v. Borough of Sayre, 384 Pa. 534, 121 A.2d 579 at 582 (Pa. 1956), as being to the same effect. There, the Supreme Court of Pennsylvania held that a "... borough has no more power to acquire land by adverse possession than has a railroad or any other company possessing the right of eminent domain." See also, In re Condemnation of Certain Ground in Prospect Park, 54 Municipal Law Reporter, 260 (1960), in which the court held that "A borough may not take land for public purposes by adverse possession but only by the exercise of eminent domain."

In sum, the Supreme Courts of the states are at odds on the requirements of the Fifth and Fourteenth Amendments in state seizures by bad faith possessions. This Court can, and should, settle this conflict in that "decent respect to the rights of men" that so marks its history.

The lower court posited Stanley v. Schwalby, 147 U.S. 508, 13 S.Ct. 416 (1893) as controlling. However, Stanley merely addressed the issue of whether a political subdivision may cure title defects through acquisitive prescription. In contrast, the instant case involves an unprecedented application of the doctrine of acquisitive prescription to a taking by a political body without just title and in legal bad faith. The constitutional significance of the distinction between possession in good faith by a public body and that body's possession as a mere squatter has not been previously addressed by this Court.

**2. WRITS SHOULD BE GRANTED TO SECURE EQUAL PROTECTION TO CITIZENS WHO CANNOT SECURE TITLE FROM THE STATE BY REASON OF POSSESSION.**

That the Supreme Court of Louisiana should sanction a taking by a Levee Board or District based upon bad faith acquisitive prescription passes into outrage when one considers the provisions of Title 38, Section 295 of the Revised Statutes of Louisiana. The Statute reads as follows:

> Sec. 295. Acquisitive Prescription Shall Not Run Against Levee Districts.
>
> The prescription by which the ownership of property is acquired as defined by Article 3458 of the Louisiana Civil Code shall not run against any levee district of the State or against the Board of Commissioners of any levee district.

Thus, the Levee Board may take from citizens, but citizens may not take from the Levee Board--an anomaly indeed. The Louisiana Courts attempt to justify this anomaly by suggesting that it is based upon the public "good" and the public "interest." This may or may not be true in the case of a <u>good faith</u> possessory title. It is most certainly false when the taking is in bad faith, a seizure which does

only violence to the public good and the public interest.

The violation of equal protection as between a private citizen and a public Levee Board is equally patent. Certainly, no reasonable basis for the distinction has been or could be offered. Again, writs should issue.

**3. WRITS SHOULD ISSUE TO PREVENT AN INFRINGEMENT UPON THE PUBLIC DOMAIN OF THE UNITED STATES BY THE UNLAWFUL AND BAD FAITH ACTIONS OF THE STATE OF LOUISIANA.**

The Levee Board began its bad faith possession of the land at bar in 1924. At that time and until the Burat patent was issued in 1972, the owner of record of that property was the United States, which had paid in cash for Sections 29 and 32

and had recorded its deed in the official depository of Plaquemines Parish.

The 30-year bad faith possession has now been held to have taken title out of the United States before 1972 so as to nullify the patent transmission of title to Hubert's heirs in 1972--all of this by the operation of a state statute.

This is plainly offensive to Article 4, Section 3 of the Constitution of the United States which provides, in part, as follows:

> The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.
>
> U.S. Const. Art 4, §3, cl. 2.

This Court has long enforced the plenary scope of this grant. Redfield v. Parks, 33 L.Ed. 327, 132 U.S. 239, 10 S.Ct. 83 (1889) is both early and typical. There, the Court held as follows:

> Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Federal government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title; **until its issuance, the fee is in the government, which, by the patent, passes to the grantee, and he is entitled to recover the possession in ejectment.** 33 L.Ed. at 330, 132 U.S. at 245, 246; 10 S.Ct. at 85; (quoting Bagnell v. Broderick, 13 Pet. 436, 10 L.Ed. 235, 38 U.S. 374 (1839)). Emphasis supplied.

The cases which recognize the principle set forth in Redfield are legion. In Gibson v. Chouteau, 13 Wall. 92, 99, 20 L.Ed. 534, 536, 80 U.S. 92, 99 (1871), for example, the United States Supreme Court emphatically held:

> With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere

with this right or embarrass its exercise. . . . (emphasis supplied).

Against a title emanating from the United States, no claim of adverse possession--acquisitive prescription--can prevail. Prescription cannot run against the sovereign. The fact that this is so and reasons for this rule are succinctly, if arcanely, set forth in Gibson:

> It is matter of common knowledge that statutes of limitation do not run against the State. That no laches can be imputed to the king, and that no time can bar his rights, was the maxim of the common law, and was founded on the principle of public policy, that as he was occupied with the cares of government he ought not to suffer from the negligence of his officers and servants. The principle is applicable to all governments, which must necessarily act through numerous agents, and is essential to a preservation of the interests and property of the public. It is upon this principle that in this country the statutes of a State prescribing periods within which rights must be prosecuted are not held to embrace the State itself, unless it is expressly designated or the mischiefs to be remedied are of such a nature that it must necessarily be included. As legisla-

> tion of a State can only apply to persons and things over which the State has jurisdiction, the United States are also necessarily excluded from the operation of such statutes. (footnote omitted) 13 Wall at 99; 20 L.Ed. at 536; 80 U.S. at 99.

Other cases which hold that one cannot prescribe against land held by the Government are also legion.

The import of these holdings cannot be stated strongly enough. The United States was record owner of Sections 29 and 32 until 1972. Until 1972, any possession by the defendants--or defendants' predecessors or anyone--had absolutely no effect. No possession ripened into title. It could not. Plaintiffs acquired ownership in 1972. Then and only then did the land pass into private ownership such that acquisitive prescription--title by possession--could begin to run. The heirs of Burat initiated this action in 1972--well prior to the time that defendants could assert any claim they acquired by possession from the Burats.

Thus, the vesting of title in the State of Louisiana's Levee Board necessarily includes the wresting of that title from the United States. This Court should correct that usurpation.

**4. AN APPEAL SHOULD LIE AND WRITS SHOULD BE GRANTED SO AS TO SECURE THE PLAINTIFFS' PROPERTY RIGHTS ARISING OUT OF AND GUARANTEED BY THE TREATIES, PATENTS AND LAWS OF THE UNITED STATES, ALL OF WHICH WERE PUT ASIDE BY THE COURTS OF LOUISIANA WHICH DECIDED THE CASE SOLELY ON THE BASIS OF THE DOMESTIC LAW OF BAD FAITH POSSESSION.**

On its merits the decision below is wrong. It requires a holding that title passed to the Burats in 1842, at the time of the quit-claim confirmatory act. Because of the sale and patents to

Hodge, all of which predate that statute, that cannot be. Even the courts of Louisiana recognize this, at least in cases in which the state is not party. To this end, one need only read Perkins, et al. v. Vincent, et al., 47 La.Ann. 579 (La. 1895). There, in a case identical to that now at bar (save for the absence of the state as a party) the Supreme Court of Louisiana ruled as follows:

> Lands subject to equitable claims within the territory acquired by the United States from Spain under the treaty of 1819, requiring survey and confirmation by the United States, are, until the approved survey, confirmation or patent issued, part of the public domain. (citations omitted)
>
> Hence until surveyed and confirmed to the claimant by act of Congress referring to the survey or patent issued, no prescription runs against him.
>
> * * *
>
> The plaintiffs sue as the heirs of James Goings. The lands claimed lie within the once disputed territory between the western boundary of the State and the Rio Hondo, the claims to

> lands within which territory were protected by our treaty with Spain in 1819. Going's claim, based on habitation only, never surveyed, was merely equitable. The Boards of Land Commissioners of the United States recommended the claim for confirmation, stating the land to be three hundred and twenty acres on the west side of "the Quelque shue," east bank of Bayou "Shou Pique," opposite the claim of James Ashworth. The confirmation was by act of Congress in 1828. While thus confirmed, the land, though subject to the equitable claim, must be deemed to have formed part of the public domain until at least it was ascertained by a public survey, and the issue of a patent or its equivalent confirmation of the claimant's title by act of Congress referring to the survey. Until such survey the land was imprescriptible, and hence no prescription in respect to such land could run against the claimant or his heirs. It is claimed the field notes of the survey were furnished in 1874, but the survey itself, by the authority of the United States, was not approved by the Surveyor General, nor was any patent issued to Goings' heirs till 1890. It is in our opinion clear that the pleas of prescription must fail. (citations omitted)

Note that the decision in Perkins was based upon federal statutes: Revised Statutes, United States, Secs. 2223, 2247. Indeed, all of the rights denied

the plaintiffs by the State of Louisiana are rooted firmly in the Constitution and body of laws of the United States.

Those rights begin, after all, with the Louisiana Purchase Treaty which obligated the United States to respect and to provide machinery for the implementation of whatever inchoate right to claim title Hubert Burat may have had prior to 1803. See: Oneida Indian Nation of New York State v. Oneida County, New York, 39 L.Ed2d 73, 414 U.S. 661, U.S. 94 S.Ct. 772 (1974). Moreover, the vested rights to title now at bar flow from a patent of the United States issued in 1972, a patent said, because of Louisiana Statutes, not to be translative of title, notwithstanding the fact that the United States, by the actions of its land officers, was the owner of record.

The validity of the 1972 patent, in turn, rests on these and many United States statutes, upon which the just result of this case depends:

ACT OF CONGRESS, MARCH 26, 1804 (2 Stat. 283)

The 8th Congress sat in 1804 and included in its business many of the problems attendant upon the Louisiana Purchase. Notably, it set aside any landholdings in the territory of the purchase of or by right of the Spanish government. It then made a proviso (Act of March 26, 1804; Sec. 14) specifically excepting the rights of actual settlers pursuant to the treaty rights previously cited:

> Provided nevertheless, that anything in this section contained shall not be construed to make null and void any bona fide grant, made agreeably to the laws, usage and customs of the Spanish government to an actual settler on the lands so granted, for himself and for his wife and family; or to make null and void any bona fide act or proceeding done by an actual settlor agreeable to the laws, usage and customs of the Spanish government, to obtain a grant for lands actually settled on by the person or persons claiming title thereto, if

> such settlement in either case was actually made prior to the twentieth day of December, one thousand eight hundred and three. (App. 37)

The beginning of the adjudication of this land case lies in the determination of the rights Burat did or did not secure pursuant to this statute. His right to make a claim to the land relates specifically to actual settlement on his estate during Spanish rule prior to 1795 and his marriage in 1803. Whatever those rights were, they were recognized and ratified by these provisions.

ACT OF CONGRESS, MARCH 2, 1805 (2 Stat. 324)

The recognition of a right is one thing; the implementation another. In 1805 the 8th Congress provided machinery through which Burat might perfect his claim. The statute provides preliminarily in Section 2:

> . . . every person or to the legal representative or representatives of every person, who being either the head of a family of 21 years of age, had prior to the 20th day of December, one thousand eight hundred and three, with the permission of the proper Spanish officer, and in conformity with the laws, usages, and customs of the Spanish government made an actual settlement on a tract of land within the said territory, not claimed by virtue of the preceeding section or of any Spanish or French grant had the actual possession of the said territories, and who did on the said 20th day of December, 1803 actually inhabit and cultivate the said tract of land; the tract of land thus inhabited and cultivated, shall be granted. (App. 39)

In order to realize the grant, Section 4 made it necessary that:

> . . . Every person claiming lands . . . shall before the first day of March, one thousand eight hundred and six, deliver to the register of the landoffice, or recorder of land titles, within whose district the land may be, a notice of writing, stating the nature and extent of his claims, together with a plat of the tract or

> tracts claimed; and shall also, on or before that day, deliver to the said register or recorder, for the purposes of being recorded, every grant, order of survey, deed, conveyance, or other written evidence of his claim; and the same shall be recorded by the register or recorder, or by the translator hereinafter mentioned, in books to be kept by them for that purpose, on receiving from the parties at the rate of twelve and one half cents for every hundred words contained in such written evidence of their claims. (App. 39)

A further provision in Section 4 placed a time limit upon the making of claims:

> . . . And if such person shall neglect to deliver such notice of writing of his claim, together with a plat as aforesaid, or cause to be recorded such written evidence of same, all his right, so far as the same is derived from the two first sections of this act, shall become void, and for ever thereafter be barred; nor shall any incomplete grant, warrant, order of survey, deed or conveyance, or other written evidence which shall not be recorded as above directed, ever after be considered or admitted as evidence in any court of the United States. (App. 39)

It is significant to note that the statute clearly contemplates that cases or controversies arising out of these land claims should be treated as federal questions, for the statute specifically reads 'in any Court of the United States.'

In Section 5 of the act, commissioners or registrars and recorders were commissioned to handle the claims, and, it is significant to note, given quasi-judicial authority:

> Each board or a majority of each board, shall, in their respective districts, have power to hear and decide in a summary manner, all matters respecting such claims, also to administer oaths, to compel the attendance of, and examine witnesses, and such other testimony as may be adduced, to demand and obtain from the proper officer and officers, all public records, in which grants of land, warrants, or orders of survey, or any other evidence of claims to land derived from either the French of Spanish governments may have been recorded; to take transcripts of such records of a public nature relative to the granting sale, transfer, or titles of lands

> within their respective districts; and to decide in a summary way, according to justice and equity on all claims filed with the register or recorder, in conformity with the provisions of this act. (App. 39)

In sum, this act confirmed and spelled out Burat's right to make a claim to title and established machinery which he ultimately put into play in order to perfect that right. The second part of the adjudication of this case requires the determination of what rights were guaranteed him by said statute, whether he met the requirements which were provided.

There is another part of the adjudication which turns upon this statute. By virtue of the many extensions in the statutory period provided for the filing of claims, Burat filed affidavits and notices in 1820 and in 1837. In 1837 the register and recorder accepted the Burat claim and favorably reported it to Congress. Note that in 1837 a valid competing title had already been secured by the

predecessors of Hodge. Note also that the register and recorder were given quasi-judicial authority. The meaning of the acceptance of the Burat claim as a quasi-adjudication by a federal officer acting pursuant to this statute is a purely federal question and bears most vitally upon the issues at bar.

## ACT OF CONGRESS, FEBRUARY 28, 1806 (2 Stat. 352) AND ACT OF CONGRESS, APRIL 21, 1806 (2 Stat. 391)

Section 3 of the February 28, 1806 act repealed the provision of the 1805 act "so far as relates to claimants whose tracts had not been surveyed by the proper officer, under the Spanish government prior to the twentieth day of December, one thousand eight hundred and three." (App. 42)

Similarly, the 1805 act had made it necessary for the claimant to land to show that he had settled with the consent of the appropriate Spanish officer. The April 21, 1806 act waived this requirement:

> Every person or persons claiming a tract of land by virtue of the second of the act, to which this act is a supplement, and who had commenced an actual settlement on such tract, prior to the first day of October, one thousand eight hundred and had continued actually to inhabit and cultivate the same, during the term of three years from the time when such actual settlement had commenced, and prior to the twentieth day of December eighteen hundred shall be considered as having made such settlement with the permission of the proper Spanish officer, although it may not be in the power of such person or persons to produce sufficient evidence of such permission. (App. 43)

## ACT OF CONGRESS, APRIL 25, 1812 (2 Stat. 713)

This 1812 act restructured the Board of Commissioners and refined their responsibilities and obligations. It confirmed however, their federal judicial authority, specifically providing that:

> The said commissioners shall have power in their respective districts

> to inquire into the justice and validity of the claims filed with them as aforesaid; it shall be their duty to ascertain in every case whether the lands claimed have been inhabited and cultivated; at what time such inhabitation and cultivation commenced; when surveyed and by whom and what authority; and into every other matter respecting the claims which may affect the justice and validity thereof; and for that purpose shall have power to administer oaths and to compel the attendance of, and examine witnesses and such other testimony as may be adduced; to have access to all records of a public nature.
> (App. 44)

Once again, the meaning of the acceptance of the Burat claim, in the face of an existing title, must be adjudicated in this case and is a purely federal question.

## ACT OF CONGRESS MAY 11, 1820 (3 Stat. 573)

## AND ACT OF CONGRESS NO. 817 FEBRUARY 6, 1835 (4 Stat. 749)

This May 11, 1820 (App. 45) act of extended the time for filing claims through December 31, 1820. Whether or not Burat secured rights by filing under this extension and the play of these rights against the outlaw titles is a federal question and must be resolved in the decision of this case. The same is precisely true of the Act of February 6, 1835 (App. 49) pursuant to which his claim was finally reported.

## ACT OF CONGRESS NO. 17, JANUARY 12, 1825 (4 Stat. 80)

This statute is critical and is reproduced in full.

> An act authorizing repayment for land erroneously sold by the United States.

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every person, of the legal representative of every person, who is or may be, a purchase of a tract of land from the United States, the purchase whereof is, or may be void, by reason of a prior sale thereof by the United States, or by the confirmation, or other legal establishment of a prior British, French or Spanish grant thereof, of for want of title thereto in the United States from any other cause whatsoever, shall be entitled to repayment of any sum or sums of money paid for, or on account of such tract of land on making proof, to the satisfaction of the Secretary of the Treasury, that the same was erroneously sold, in manner aforesaid by the United States, who is hereby authorized and required to repay such sum or sums of money, paid as aforesaid. (App. 48)

Pursuant to this act, the United States bought back two of the four sections deeded to Hodge. The meaning of the act and the meaning and effect of buy-back is a federal question and one upon which a critical part of this case will resolve itself.

## ACT OF CONGRESS, NO. 852, JULY 6, 1842 (5 Stat. 491)

Following a favorable reporting by the register and recorder, Congress confirmed the Burat claim (No. 60 on the report). Section One of this statute recites that ". . . the claims . . . being numbers . . . sixty . . . be and the same are hereby confirmed." Section 4 of the statute then makes an important caveat:

> Provided, That this act shall amount only to a relinquishment on the part of the United States, and shall in no manner affect the rights of third persons, and, on the presentation to the Commissioner of the General Land Office of a plat of survey duly approved by the surveyor-general of the State of Louisiana, the claimant shall be entitled to a patent. (App. 51)

This statute is, of course, critical to the case. The deeding was, in the language used, a quit-claim of the interests of the United States. What that means and what that interest was, in view of the valid

earlier titles, are purely federal questions which must be resolved by this Court.

## ACT OF CONGRESS, JUNE 2, 1858
## (11 Stat. 249)

Burat had an inchoate right in his estate, less than title, and even less than equitable title. The nature of that right may be described by analogy by Section 3 of the act of June 2, 1858 which provides in part:

> . . . in all cases of confirmation by this act or where any private land claim has been confirmed by Congess, and the same in whole or in part, has not been located or satisfied either for want of a specific location prior to such confirmation, or for any reason whatsoever other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor-general of the district in which such claim was situated, upon satisfactory proof that such claim has been so confirmed and that the same, in whole or in part, remains unsatisfied to

> issue to the claimant, or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied. (Emphasis added) (App. 52)

Exactly what a confirmed but unsatisfied claim may be is by no means crystal clear. It is clear that in 1888, the surveyor general's opinion, when acting in a quasi-judicial federal capacity, was that the shoe fit. What the nature of the beast is and what its relation to the Burat heirs title might be are entirely federal questions.

There are also several federal questions essential to the case that a simple listing of the relevant statutes will not make plain. Certainly foremost is the precise meaning of the 1972 transmission of patent. The question might be stated this way: What rights did the United States have (pursuant to its sole control of the public domain), to transmit to the Burat heirs of 1972, in face of a state bad faith possession, and in view of the Hodge

titles and the United States buy-back. It is the epicenter of the plaintiff's case and it is entirely federal.

Other Federal questions are both plain and important:

1. What land rights flow from the United States to a settler by the act of official survey of the surveyor general pursuant to a confirmed but unsatisfied land claim?

2. What is the effect of congressional confirmation of a land claim, title to which has since passed, on record, from the United States to a private land owner by a sale valid in form under the then existing laws?

3. Is a state court empowered to declare void patents issued by the United States?

4. May a state take, by bad faith possession, title to property, the record owner of which is the United States?

These threads, spun from the fabric of federal law, mesh in ways which seem clear to the petitioners. Based upon his settlement and possession, Burat took up rights which were not satisfied until 1972 when patents were issued to his heirs.

This was implicit in the ruling on his case made by a United States Land Officer in 1888. That officer was Calhoun Fluker, U.S. Surveyor General for the District of Louisiana. Fluker ruled that in view of the valid sale and valid patents issued in favor of Hodge, the Burat claim was confirmed but unsatisfied.

It should have been satisfied by the 1972 patent, but the courts and laws of Louisiana have erroneously frustrated the change of title required by the Constitution and laws of the United States.

The Burat heirs stand upon these statutes. The outcome of the case depends on their construction. Writs should issue to finally honor the commitments of the United States--to Burat and his heirs.

## CONCLUSION

1. Writs should issue.

2. An appeal should lie.

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